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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-205846

DATE: April 1, 1982

MATTER OF: Department of the Interior--Request
for Advance Decision; Yosemite
Park and Curry Company

DIGEST:

1. Inherent in ordinary definition of word "concession" is the notion that a concession operation gives rise to revenues from the concessioner's "right to undertake and profit by a specified activity." However, as to Yosemite Park bus shuttle system, it is clear that appropriated funds rather than concession revenues have been source of financing for contract to operate system as well as proposed system contract. Therefore, existing concessioner at park is not entitled to right of first refusal for proposed contract.

2. Protest against solicitation defects is untimely filed with GAO. If protest was timely filed with procuring agency before solicitation's closing date, subsequent protest to GAO was untimely made several months after procuring agency took initial adverse action on the protest. See 4 C.F.R. § 21.2(a) (1981). Alternatively, if protest was not filed before closing date with procuring agency but was, instead, first filed with GAO after closing date, then protest is still untimely. See 4 C.F.R. § 21.2(b)(1) (1981).

The United States Department of the Interior requests an advance decision on the propriety of the National Park Service's proposed award of a contract under request for proposals (RFP) No. 8000-81-71. The contract is to provide shuttle transportation services to visitors within Yosemite National Park. Yosemite Park and Curry Company (YPCO) has asserted a "preferential right" (that is, a right of first refusal) to provide the transportation

services requested under the RFP. YPCC contends that this preferential right was granted to it under the terms of its 30-year contract entered into with Interior on May 9, 1963. YPCC also argues that the statutes governing the granting of concessions to private concerns to provide services in the National Parks (16 U.S.C. § 3, et seq. (1970)) and, specifically, 16 U.S.C. §§ 20(c) and 20(d) (1970), grant the company a statutory preferential right to provide the transportation services.

Interior states that if such a preferential right is held to exist, "section 16 of the 1963 concession contract would require [cancellation of] the RFP" and negotiations with YPCC for the required services in accordance with procedures described in section 16 of the 1963 concession contract and 36 C.F.R. part 51 (1981). As stated at 36 C.F.R. § 51.3(b) and (c) (1981):

"(b) 'Right of Preference' refers to the right of existing satisfactory concessioners to a preference in the renewal or negotiation of a new contract or permit covering substantially the same * * * services as provided by the concessioner under the terms of its existing contract or permit.

"(c) 'Preferential Right' refers to the right to provide new or additional services * * * which may be granted to a concessioner by [amendment of a] Concession Contract * * *."

We conclude that YPCC is not entitled to a first refusal right for the proposed contract.

Under the 1963 contract, YPCC provides visitor facilities and services at the Park and YPCC is authorized to sell the specified goods and services to park visitors at Interior-approved rates. These rates are to be such as to allow YPCC an "opportunity to make a fair profit." In consideration of this right, YPCC pays Interior a franchise fee based on a percentage of YPCC's gross receipts. Until 1971, park visitors directly paid YPCC for the transportation services. In 1971, in order to reduce automobile congestion which was damaging park environs, YPCC and Interior executed an agreement to provide "free" shuttle bus services to park visitors. Interior agreed to reimburse the concessioner for its actual expenses plus a reasonable profit. The agreement stated it was "entered

into * * * pursuant to [YPCC's] preferential right and * * * subject to" the concession contract.

YPCC suggests that shuttle service since 1971 has not been paid to YPCC out of appropriated funds but rather directly from park user fees. And YPCC makes a similar allegation about the proposed service under this RFP. As stated by YPCC:

"* * * the transportation services called for by the RFP will not be free to the public. While a specific fare may not be levied for visitor transportation, YPCC has been advised by the Park Service that the Park entrance fees will be increased in order to pay for the transportation."

It is important to know precisely whether appropriated funds will be the financing source for the proposed contract. If the funds are not considered to be appropriated but rather revenues flowing from the operation of the shuttle system, the shuttle operation would still, in our view, be properly characterized as a concession operation although Interior, rather than the concessioner, would be collecting the concession fee. This conclusion flows from the ordinary definition of the word concession which means a "right to undertake and profit by a specified activity." Webster's New Collegiate Dictionary 233 (1975).

It is our understanding that the Yosemite Park entrance fees referred to by YPCC are fees which are to be deposited into a special account within the United States Treasury and are to be "available for appropriation * * * for any authorized outdoor recreation function * * *." See 16 U.S.C. § 4001-0a(f) (1976). Therefore, whether the funds used to pay YPCC in the past or the funds to be used to pay the proposed contractor under this RFP are seen as originating from this special account within the Treasury or from some other Treasury account is immaterial. In either event, appropriated funds are still the source of financing for the shuttle system.

In our view, both YPCC's 1963 contract and 16 U.S.C. §§ 20(c) and (d), above, relate only to YPCC's right of

first refusal to contracts to be awarded on a concession basis--not to contracts to be financed by appropriated funds. Although Interior may have erroneously granted YPCC a right of first refusal for these services from 1971 to the present, Interior may not now be estopped to deny YPCC a right of first refusal under this RFP. See Yosemite Park and Curry Company v. United States, 582 F.2d 552 (Ct. Cl. 1978).

We think it is clear that the 1963 contract was limited to granting concessional rights and privileges. For example, in the preface to the contract, the concessioner, not the United States, is to establish, maintain and operate public facilities and accommodations under the contract. The concessioner is authorized to charge the public for use of these facilities, but the rates and prices are subject to regulation and approval of the Secretary of the Interior. In our view, this contract is clearly concerned with concession rights, not the direct purchase of goods and services by the Government with appropriated funds. Therefore, section 16 of the contract--concerning the first refusal right--must be read consistent with the meaning and intent of the entire contract. The contract grants a preferential right to YPCC to concession operations in Yosemite, and this right is not applicable to a contract predominantly financed by an appropriation.

YPCC also contends that the pertinent statutes and implementing regulations grant YPCC a preferential right to the transportation services. YPCC cites, specifically, 16 U.S.C. § 20(c), above, which states that the "Secretary may authorize * * * [a] preferential right to provide such new or additional * * * services as the Secretary may consider necessary or desirable for the accommodation and convenience of the public." However, in our view, this statutory provision and the other related provisions concerning the establishment of services for the public in the parks (see 16 U.S.C. § 3, et seq. (1976)) are limited to the granting of concession contracts and permits. For example, in the Senate Report (No. 765, reprinted in 1965 U.S. Cong. and Ad. News 3489) which accompanied the proposed legislation now found in 16 U.S.C. § 20, above, it is stated that the section relates "to the establishment of concession policies in the areas administered by the National Park Service." The report further states that:

"The principal purpose of these bills is to put into statutory form policies

which * * * have * * * been followed by the National Park Service in administering concessions within * * * the National Park System and in writing contracts for concessionaire services there." senate Report, above. (Emphasis added.)

Again, the statutory language and legislative history concern concession operations; the text of the statute and legislative history do not indicate that the concessioner's rights were intended to extend the preferential right to the procurement of park services with appropriated funds.

Interior also cites a reference in the legislative history of 16 U.S.C. section 3, above, which further supports the view that the relevant statutory language contemplated contracts only for concession operations. As stated by Interior:

"* * * the House Report on the Act of August 25, 1916, 39 Stat. 435 (16 U.S.C. § 3), states that the authority contemplated by the bill is to contract for concession operations * * *. [As stated in that report:]

"The Committee is of the opinion that plans now being carried out will tend more and more to make the Parks self-sustaining without extortion or unreasonable charge on the traveling public, merely by organization and control to the concessionaires. The subject of concessions is taken into account in section 3, where it is provided that the Secretary of the Interior may grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various Parks, monuments or other reservations * * *.

"Under the terms of concessions already granted, the Public is insured good service and reasonable charges * * *. H.R. Rep. No. 700, 64th Cong., 1st Sess. (1916)."

Accordingly, under our review of the 1963 contract, the relevant statutes and legislative history, we disagree with YPCC's position that the preferential rights granted by contract and statute extend to contracts for the procurement of services with appropriated funds.

Finally, we note YPCC's argument that to deny the company a right of first refusal in these circumstances would render its preferential right "meaningless." This would not appear to be the result, however, since the operation of the shuttle service on a concession basis might be resumed by Interior at any time upon termination or expiration of the contract to be funded by appropriations. In this circumstance, of course, YPCC would be accorded its preferential right. This right, in our view, cannot be termed meaningless.

Protest

Incident to Interior's request, YPCC filed a protest with our Office on January 6, 1982, concerning alleged defects in the RFP which, YPCC claims, prevented the company from submitting a "meaningful response to the RFP."

YPCC submitted similar concerns to Interior by letter dated October 20, 1981, which was 1 day prior to the RFP's closing date on October 21, 1981. The present record does not show when Interior received YPCC's letter. Nevertheless, based on the facts of record, we conclude YPCC's January 6 protest with our Office is untimely filed under our Bid Protest Procedures (4 C.F.R. § 21 (1981)).

If YPCC's October 20, 1981, letter to Interior was intended to be a protest of the RFP and if, in fact, Interior received the letter before the closing date on October 21, the contracting agency's receipt of proposals without correcting the RFP as requested by YPCC constituted initial adverse agency action on the protest. General Leasing Corporation--Reconsideration, B-193527, March 9, 1979, 79-1 CPD 170. Any subsequent protest from YPCC had to have been filed with our Office within 10 working days of the closing date. See 4 C.F.R. § 21.2(a) (1981). However, YPCC's protest of the RFP was not received by us until January 1982.

Alternatively, if YPCC's October 20 letter was not intended to be a protest, or, if intended to be a protest, was not filed with Interior prior to the RFP's closing date, the January protest is still untimely filed. see 4 C.F.R. § 21.2(b)(1) (1981).

Consequently, we dismiss YPCC's protest.

for *Milton J. Fowler*
Comptroller General
of the United States